No. 17-50762

In the United States Court of Appeals for the Fifth Circuit

CITY OF EL CENIZO, TEXAS; RAUL L. REYES, MAYOR, CITY OF EL CENIZO; TOM SCHMERBER, COUNTY SHERIFF; MARIO A. HERNANDEZ, MAVERICK COUNTY CONSTABLE PCT. 3-1; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; MAVERICK COUNTY; CITY OF EL PASO, Plaintiffs-Appellees,

CITY OF AUSTIN, JUDGE SARAH ECKHARDT, IN HER OFFICIAL CAPACITY AS TRAVIS COUNTY JUDGE; SHERIFF SALLY HERNANDEZ, IN HER OFFICIAL CAPACITY AS TRAVIS COUNTY SHERIFF; TRAVIS COUNTY; CITY OF DALLAS, TEXAS; TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS; THE CITY OF HOUSTON, Intervenors-Plaintiffs-Appellees,

v.

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS, IN HIS OFFICIAL CAPACITY, KEN PAXTON, TEXAS ATTORNEY GENERAL, Defendants-Appellants.

EL PASO COUNTY; RICHARD WILES, SHERIFF OF EL PASO COUNTY, IN HIS OFFICIAL CAPACITY; TEXAS ORGANIZING PROJECT EDUCATION FUND; MOVE SAN ANTONIO, Plaintiffs-Appellees,

v.

STATE OF TEXAS; GREG ABBOTT, GOVERNOR; KEN PAXTON, ATTORNEY GENERAL; STEVE MCCRAW, DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, Defendants-Appellants.

CITY OF SAN ANTONIO; BEXAR COUNTY, TEXAS; REY A. SALDANA, IN HIS OFFICIAL CAPACITY AS SAN ANTONIO CITY COUNCILMEMBER; TEXAS ASSOCIATION OF CHICANOS IN HIGHER EDUCATION; LA UNION DEL PUEBLO ENTERO, INCORPORATED; WORKERS DEFENSE PROJECT, Plaintiffs-Appellees,

CITY OF AUSTIN, Intervenor Plaintiff-Appellee,

v.

STATE OF TEXAS; KEN PAXTON, SUED IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS; GREG ABBOTT, SUED IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS, Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Texas, San Antonio Division, Nos. 5:17-cv-404, 5:17-cv-459, 5:17-cv-489

BRIEF FOR APPELLANTS

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Certificate of Interested Persons

Under the fourth sentence of Fifth Circuit Rule 28.2.1, because appellants are governmental parties, they need not furnish a certificate of interested parties.

Statement Regarding Oral Argument

Appellants respectfully submit that oral argument would assist the merits panel, for the same reasons that the stay panel ordered oral argument on appellants' motion for a stay pending appeal.

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Statement of Jurisdiction

The four claims at issue arise under federal law, thus conferring subject-matter jurisdiction in district court under 28 U.S.C. §1331. This Court has appellate jurisdiction under 28 U.S.C. §1292(a)(1). The preliminary injunction was entered on August 30, 2017, ROA.4120, and an amended notice of appeal was timely filed on September 1, 2017, ROA.4244.

Issues Presented

1. Whether the ICE-detainer mandate of Texas Senate Bill 4 (SB4), Tex. Gov't Code §752.053(a)(3); Tex. Code Crim. Proc. art. 2.251, violates the Fourth Amendment or is preempted.

2. Whether SB4's assistance-and-cooperation provision, Tex. Gov't Code §752.053(b)(3), is preempted.

3. Whether SB4's "materially limit" language, Tex. Gov't Code §752.053(a)(1)-(2), is facially void for vagueness.

4. Whether SB4's "endorse" provision, Tex. Gov't Code §752.053(a)(1), violates the Free Speech Clause.

5. Whether plaintiffs made the requisite equitable showings to obtain a preliminary injunction of SB4 provisions.

STATEMENT OF THE CASE

A. Background

The issue of "sanctuary cities" not cooperating with federal officials in enforcing immigration law entered the national spotlight in 2015 when Kate Steinle was killed by an unlawfully present alien.[1] The repeat-felon alien had been in local custody but was released because of San Francisco's sanctuary-city policy, which forced the sheriff to refuse an "ICE detainer" requesting local cooperation with federal immigration authorities in taking custody of the alien for removal proceedings.[2]

This tragic fact pattern repeated itself earlier this year, when the San Francisco sheriff's department refused a federal ICE-detainer request and released another alien who was soon after arrested for committing—while he could have been in federal immigration custody—murder, battery, and shooting at a dwelling.[3]

At the national level, attention to sanctuary-city policies resulted in a congressional hearing on the threat to public safety.[4] It also led the Obama Administration

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[1] Abby Phillip, *Is San Francisco's 'Sanctuary City' Policy to Blame for a Woman's Death?*, WashingtonPost.com, July 6, 2015, https://perma.cc/5JXP-GZWQ.

[2] *Id.*; *see* S.F. Admin. Code ch. 12H, https://perma.cc/K9TF-6D9D.

[3] Vivian Ho, *Alleged SF Killer Had Been Released from Jail Despite Request for Immigration Hold*, SFGate.com, Sept. 16, 2017, https://perma.cc/5VQF-Y7CF.

[4] *Sanctuary Cities: A Threat to Public Safety*, *Hearing Before the Subcomm. on Immigration and Border Security of the H. Comm. on the Judiciary*, 114th Cong., 1st Sess. (2015), https://perma.cc/847D-5E4U.

to notify cities that their Justice Assistance Grants would be jeopardized for noncompliance with the Department of Justice's "JAG Sanctuary Policy Guidance."[5] And, in January 2017, the President signed an executive order declaring: "Sanctuary jurisdictions across the United States . . . have caused immeasurable harm to the American people and to the very fabric of our Republic."[6]

Texas likewise focused on the problem of sanctuary cities. One notable concern was the Travis County Sheriff's policy, which picked the crimes of detention that the Sheriff deemed serious enough to require officers to comply with ICE-detainer requests. *See* ROA.577; ROA.2447 (describing policy). Texas lawmakers disagreed with her stance: "[The Travis County Sheriff] has labeled three offenses that she is willing to detain people for [at ICE's request]. Notably, what is not in those is rape, child pedophilia[, and] other offenses that are just as heinous and just as personal."[7]

The Texas Legislature therefore enacted Senate Bill 4 (SB4) to prohibit sanctuary-city policies throughout Texas. Act of May 3, 2017, 85th Leg., R.S., *reproduced at* ROA.4214-29.

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[5] U.S. Department of Justice, Office of Justice Programs Guidance Regarding Compliance with 8 U.S.C. § 1373, at 2 (July 7, 2016), https://perma.cc/9ST2-GG4W.

[6] Executive Order 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017).

[7] *Enforcement by Certain Local Government Entities and Campus Police Departments of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the S. Comm. on State Affairs*, 85th Leg., R.S., at 01:29:15-:30 (2017) (statement of Sen. Charles Perry).

B. Senate Bill 4 overview

SB4 has two main components: (1) its ICE-detainer provisions, and (2) its enforcement-cooperation provisions.

1. SB4's ICE-detainer provisions

SB4 authorizes and generally requires Texas law-enforcement agencies to comply with federal ICE-detainer requests:

> (a) A law enforcement agency that has custody of a person subject to an immigration detainer request issued by United States Immigration and Customs Enforcement ["ICE"] shall:
>
> (1) comply with, honor, and fulfill any request made in the detainer request provided by the federal government; and
>
> (2) inform the person that the person is being held pursuant to an immigration detainer request issued by United States Immigration and Customs Enforcement.

Tex. Code Crim. Proc. art. 2.251(a). SB4 has a single exception to this general requirement:

> (b) A law enforcement agency is not required to perform a duty imposed by Subsection (a) with respect to a person who has provided proof that the person is a citizen of the United States or that the person has lawful immigration status in the United States, such as a Texas driver's license or similar government-issued identification.

Id. art. 2.251(b).

SB4 separately prohibits intentional violations of the article 2.251 duty to comply with ICE-detainer requests: "(a) A local entity or campus police department may not . . . (3) for an entity that is a law enforcement agency or for a department, as

demonstrated by pattern or practice, intentionally violate Article 2.251, Code of Criminal Procedure." Tex. Gov't Code §752.053(a)(3).

As of April 2017, federal ICE officers making a detainer request to state or local officials must use Form I-247A to give notice "that ICE intends to assume custody of a removable alien in the [law enforcement agency]'s custody." U.S. Immigration and Customs Enforcement, Policy No. 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers ("ICE Policy 10074.2") §3.1 (Mar. 24, 2017), https://perma.cc/T6FJ-FXL3 (defining "detainer"); *see id.* §2.1 (directing that the "consolidated detainer form," Form I-247A, "shall be used as of the effective date of this Directive"). Through such a detainer request, ICE asks that a law-enforcement agency: (1) notify DHS as soon as practicable before an alien is released and (2) maintain custody of the alien for up to 48 hours beyond that preexisting release date so that DHS may assume custody. U.S. Department of Homeland Security, Immigration Detainer – Notice of Action, DHS Form I-247A (3/17), https://perma.cc/RH4C-5D8Q.

This ICE detainer communicates to a law-enforcement agency that "DHS has determined that probable cause exists that the subject is a removable alien." *Id.* at 1. That express representation of probable cause is made in *all* detainer requests under the form, and ICE officers can check a box further indicating their basis for probable cause. *Id.*; *accord id.* at 2 ("An immigration detainer is a notice to a law enforcement agency that DHS intends to assume custody [of a detainee] because there is probable cause that [the detainee is] subject to removal from the United States under federal immigration law."); ICE Policy 10074.2 §2.4 (requiring, as of April 2017, that ICE

officers "must establish probable cause to believe that the subject is an alien who is removable from the United States before issuing a detainer" and requiring that detainers be accompanied by an administrative warrant). ICE can cancel a detainer request after it is issued, ICE Policy 10074.2 §2.8, thus ending the factual predicate for a Texas official's state-law duty under SB4 to comply with the detainer.

2. SB4's enforcement-cooperation provisions

SB4 separately directs Texas law-enforcement agencies not to prohibit or materially limit their officers from cooperating with federal officials in the enforcement of immigration law. Subsections (a)(1) and (a)(2) of Government Code §752.053 establish a general ban on policies and practices that prohibit or materially limit the enforcement of immigration laws; subsections (b)(1) through (b)(4) then provide four concrete examples of actions that a local entity may not prohibit or materially limit:

> (a) A local entity or campus police department may not:
>
> > (1) adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws; [or]
> >
> > (2) as demonstrated by pattern or practice, prohibit or materially limit the enforcement of immigration laws; . . . .
>
> (b) In compliance with Subsection (a), a local entity or campus police department may not prohibit or materially limit a [specified official] from doing any of the following:
>
> > (1) inquiring into the immigration status of a person under a lawful detention or under arrest;
> >
> > (2) with respect to information relating to the immigration status, lawful or unlawful, of any person under a lawful detention or under arrest, including information regarding the person's place of birth: (A) sending

> the information to or requesting or receiving the information from [specified agencies]; (B) maintaining the information; or (C) exchanging the information with another local entity or campus police department or a federal or state governmental entity;
>
> (3) assisting or cooperating with a federal immigration officer as reasonable or necessary, including providing enforcement assistance; or
>
> (4) permitting a federal immigration officer to enter and conduct enforcement activities at a jail to enforce federal immigration laws.

Tex. Gov't Code §752.053(a)-(b).

3. SB4's consequences for state actors

SB4 is enforced through consequences for agencies and officials who disregard their state-law duties. One potential consequence is an injunction and monetary penalty against a noncompliant entity. *Id.* §§752.055(a)-(b), 752.056(a). A second potential consequence is removal from elective or appointive office of a political subdivision of the State. *Id.* §752.0565. Additionally, certain officials' failure to comply with SB4's ICE-detainer provision is a misdemeanor offense. Tex. Penal Code §39.07(a)-(c). Conversely, local entities are entitled to defense and indemnification by the State for any claim arising out of their good-faith compliance with an ICE-detainer request as required by article 2.251, Tex. Gov't Code §402.0241, and SB4 creates a grant program for local law-enforcement entities to offset costs related to ICE-detainer compliance, *id.* §772.0073.

C. Procedural history

In three consolidated actions, SB4 was challenged by Texas cities, counties, local law-enforcement officials, a mayor, a city councilmember, and advocacy groups. ROA.4763-88. Plaintiffs filed motions for a preliminary injunction, to which the

State filed a consolidated response. ROA.2583-2697. A motion hearing was held on June 26, 2017. ROA.4248-4521. Two days before SB4's September 1, 2017 effective date, the district court entered a preliminary injunction of key SB4 provisions, finding plaintiffs likely to prevail on four claims:

- a Fourth Amendment and preemption challenge to article 2.251's ICE-detainer provision, ROA.4180-4200;
- a preemption challenge to §752.053(b)(3)'s assistance-and-cooperation provision, ROA.4138-52;
- a void-for-vagueness challenge to §752.053(a)(1) and (a)(2)'s "materially limit" language, ROA.4173-80; and
- a free-speech challenge to §752.053(a)(1)'s "endorse" prohibition, ROA.4152-67.

The district court denied the State's motion for a stay pending appeal. ROA.51 (August 31, 2017 text order).

The State then moved in this Court for a stay pending appeal. After oral argument by plaintiffs, the State, and the United States as amicus curiae supporting a stay, this Court granted a stay in significant part. *City of El Cenizo v. Texas*, No. 17-50762, 2017 WL 4250186 (5th Cir. Sept. 25, 2017) (per curiam) ("Stay Op."). The panel held that the State is "likely to succeed on the merits of two of the claims" at issue, namely:

- plaintiffs' Fourth Amendment and preemption challenge to article 2.251's requirement to comply with ICE-detainer requests; and
- plaintiffs' preemption challenge to §752.053(b)(3)'s assistance-and-cooperation provision, as "the statute on which the district court relied, 8 U.S.C. § 1357(g), provides for such assistance."

Id. at *2.

As to plaintiffs' other two claims underlying the injunction, the stay panel left in place the preliminary injunction as to the terms "materially limit" and "endorse," concluding that their "interpretations are best left for the time when this court's ruling would have more finality." *Id.*

SUMMARY OF THE ARGUMENT

I. Plaintiffs do not have a likelihood of success on the four claims at issue.

A. SB4's ICE-detainer mandate does not violate the Fourth Amendment and is not preempted. State and local compliance with federal ICE-detainer requests has existed since at the least the 1940s, and this historical pedigree alone refutes any facial Fourth Amendment violation when States and their localities honor ICE-detainer requests backed by the federal government's representation of probable cause of removability.

Federal officials undisputedly do not engage in unreasonable seizures when they detain an alien based on probable cause of removability. And no different Fourth Amendment probable-cause predicate applies when local officials are effecting the first 48 hours of that seizure pursuant to the federal government's express request. The collective-knowledge doctrine provides that local officials have probable cause based on federal officials' express representation of probable cause of removability.

SB4's ICE-detainer mandate also is not preempted, because it promotes valid state and local cooperation at the request of federal officials. It is thus covered by 8 U.S.C. §1357(g)(10)(B), which confirms that States and localities do not need a formal written agreement with the federal government to cooperate with federal officials' enforcement of immigration law. The ICE-detainer mandate is not preempted

under *Arizona v. United States*, 567 U.S. 387, 410 (2012), for it is not "unilateral state action" done "absent any request, approval, or other instruction from the Federal Government."

B. SB4's assistance-and-cooperation provision is not preempted for largely the same reasons that the ICE-detainer mandate is not preempted: both provisions apply only when there is first a federal request for assistance. After all, the assistance-and-cooperation provision applies only to assistance and cooperation "with a federal immigration officer," which necessarily requires federal officers to be in control of the enforcement operation at issue. Thus, SB4's assistance-and-cooperation provision falls within 8 U.S.C. §1357(g)(10)(B)'s savings clause and does not implicate "unilateral state action" preempted under *Arizona*, 567 U.S. at 410.

C. SB4's "materially limit" language is not facially void for vagueness. A facial vagueness claim requires that a law lacks even a clear core. But, here, plaintiffs have conceded that various policies of theirs are covered by SB4, confirming that SB4 has a valid core. Plaintiffs have raised various factbound hypotheticals throughout this litigation, but disputes with those scenarios can—and must—be raised in discrete as-applied challenges. Such hypotheticals cannot sustain a facial challenge, as they cannot possibly show that there is "no set of circumstances" in which SB4 is valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

D. SB4's "endorse" prohibition does not violate the Free Speech Clause. The term "endorse" has a limiting dictionary definition of "to sanction; to ratify," which fits the context here and confirms that this statutory term covers only use of governmental power. The term does not cover political speech or otherwise infringe on free

speech. And this limiting definition must be adopted: "every reasonable construction" must be given to save a statute from any constitutional infirmities. *Skilling v. United States*, 561 U.S. 358, 406 (2010).

II. Nor can plaintiffs establish the equitable factors necessary for a preliminary injunction. The district court's finding of irreparable injury to plaintiffs largely rises or falls with the court's merits rulings. Moreover, law-enforcement officers cannot vicariously raise third parties' Fourth Amendment rights or generally take issue with enforcement of state laws. The district court also wrongly held that cities, counties, and local officials have cognizable interests in allocating resources contrary to the State's directives. And the district court erred by crediting testimony from SB4's political opponents to declare enforcement of the challenged provisions against the public interest. The interests of the State and the public merge when the State challenges an injunction of state law, which causes irreparable injury.

ARGUMENT

Plaintiffs are not entitled to a preliminary injunction, which requires them to show a substantial likelihood of success on the merits, irreparable injury, a balance of hardships favoring them, and no adverse effect on the public interest. *See Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 268 (5th Cir. 2012). The Court's abuse-of-discretion review of a preliminary injunction scrutinizes legal issues de novo and fact findings for clear error. *Id.* at 267.

I. Plaintiffs Do Not Have a Substantial Likelihood of Success.

A. Article 2.251's ICE-detainer mandate is valid.

The district court erred in finding that SB4's ICE-detainer mandate, Tex. Gov't Code §752.053(a)(3); Tex. Code Crim. Proc. art. 2.251, is likely invalid.[8]

At the outset, the district court wrongly believed that Texas officials lack *state-law* authority to comply with ICE-detainer requests. SB4 itself provides state-law authority. *Id.* art. 2.251(a) (authorizing Texas law-enforcement officials to detain persons "subject to an immigration detainer request issued by [ICE]").[9] The district court thus wrongly said that the State has "not identified any provision of law—within the INA, Texas statute, or some other legal authority—that authorizes the local officials subject to SB 4 to arrest and detain for civil immigration violations." ROA.4195.

The district court also wrongly concluded that detention pursuant to an ICE-detainer request is unreasonable under the Fourth Amendment. *See infra* Part I.A.1. And SB4's ICE-detainer mandate is not preempted. *See infra* Part I.A.2. The district court's sweeping rationale would invalidate a host of longstanding detention practices and even localities' voluntary compliance with ICE-detainer requests. As the stay panel noted, the State is likely to prevail on the merits of this claim. Stay Op. *2.

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[8] The State appeals the entire injunction—including the injunction of penalty provisions applicable to each primary SB4 provision enjoined. *See* ROA.4212-13.

[9] *Cf. Lunn v. Commonwealth*, 78 N.E.3d 1143, 1154 (Mass. 2017) (holding detention impermissible because no Massachusetts state law authorized local officers to honor ICE-detainer requests).

1. Article 2.251's ICE-detainer provisions do not violate the Fourth Amendment.

Article 2.251 directs compliance with ICE-detainer requests.[10] Detention pursuant to such requests is fully valid because (a) federal immigration officials can detain aliens based on probable cause of removability, and (b) local officials can carry out the first 48 hours of such a detention at the direction of federal immigration agents, with probable cause of removability imputed to local officials under the collective-knowledge doctrine.

a. Federal detention for civil immigration violations is unquestionably valid under the Fourth Amendment.

It is undisputed that the Fourth Amendment does not prohibit federal immigration authorities from detaining aliens for noncriminal immigration violations.[11] The

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[10] ICE detainers request information and detention. *See supra* p. 4. Only the latter is even relevant to a Fourth Amendment analysis. *See* ROA.4203 (gathering or sharing information that "does not prolong an otherwise lawful detention" does not violate the Fourth Amendment) (citing *Muehler v. Mena*, 544 U.S. 93, 101 (2005)).

[11] "[N]either this court nor the Supreme Court" has extended the Fourth Amendment "to a native and citizen of another nation who entered and remained in the United States illegally." *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011). "An alien present in the United States who has not been admitted" is considered only an "applicant for admission." 8 U.S.C. §1225(a)(1); *see Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) (noting that an alien at a port of entry "is treated as if stopped at the border"). Under this "entry fiction," aliens who entered unlawfully are deemed "as if stopped at the border," so where "the entry fiction applies . . . there is no violation of the Fourth Amendment." *Castro v. Cabrera*, 742 F.3d 595, 599-600 (5th Cir. 2014). It is thus doubtful that the Fourth Amendment even applies to many aliens subject to ICE detainers.

district court conceded the "broad and long-recognized" authority of federal officials to seize aliens based on probable cause of civil immigration violations. ROA.4188 (citing, *e.g.*, *United States v. Varkonyi*, 645 F.2d 453, 458 (5th Cir. Unit A May 1981)); *see Arizona*, 567 U.S. at 407-08; 8 U.S.C. §1103(a); ICE Policy 10074.2 §§2.4-2.6.

This authority is almost as old as the Union: "Statutes providing for deportation have ordinarily authorized the arrest of deportable aliens by order of executive official" since 1798. *Abel v. United States*, 362 U.S. 217, 233 (1960). *Abel* declined to resolve the constitutionality of an arrest under an administrative immigration warrant because "[s]tatutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time." *Id.* at 230.

Immigration detention authority is not limited to criminal immigration-law violations. Civil removal proceedings contemplate the necessity of detention. *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 523 (2003) (stating, regarding no-bail detention: "this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process"); *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001) (distinguishing "detention pending a determination of removability" from the question of authority to detain indefinitely). Hence, warrantless detention for civil immigration violations satisfies the Fourth Amendment's reasonableness requirement if there is "probable cause to detain."[12] *E.g.*, *Morales v. Chadbourne*, 793

[12] In *Morales*, ICE's request to detain was held not to establish probable cause of removability because the request in that case merely stated that an "[i]nvestigation ha[d] been initiated to determine whether [Morales] is subject to removal from the

F.3d 208, 218 (1st Cir. 2015); *United States v. Quintana*, 623 F.3d 1237, 1241-42 (8th Cir. 2010).

Immigration-enforcement arrests based on federal officials' removability determinations need not be supported by *judicial* warrants. *See, e.g.*, *Roy v. Cty. of L.A.*, No. 2:12-cv-09012, 2017 WL 2559616, at *6-10 (C.D. Cal. June 12, 2017) ("No court has held to the contrary."). Rather, "the executive and the Legislature have the authority to permit executive—rather than judicial—officers to make probable cause determinations regarding an individual's deportability." *Id.* at *8; *see Abel*, 362 U.S. at 232 (noting that the INA gave "authority to the Attorney General or his delegate to arrest aliens pending deportation proceedings under an administrative warrant, not a judicial warrant within the scope of the Fourth Amendment."); *United States v. Tejada*, 255 F.3d 1, 3 (1st Cir. 2001) ("[T]o comply with the applicable [detention] statute, the arresting authorities needed to bring appellant to an [ICE] examining officer, not a magistrate, 'without unnecessary delay.'").

United States." *Morales*, 793 F.3d at 213. The First Circuit found that ICE's "sole purpose" was "to request the continued detention of an alien so that ICE officials may assume custody of that alien and investigate whether to initiate removal proceedings against her," whereas the Fourth Amendment required "probable cause to arrest and detain individuals for the purpose of investigating their immigration status." *Id.* at 214-17. By contrast, current ICE-detainer policy requires not only an express probable-cause-of-removability representation by a federal immigration official, but an immigration warrant, too. ICE Policy 10074.2 §2.4.

b. Once federal immigration agents develop probable cause to detain for an immigration violation, local law-enforcement officers may detain at their request under the Fourth Amendment.

The district court fundamentally erred in holding that state or local officials must satisfy a "probable cause predicate" that "differs" from the predicate that federal official must satisfy. ROA.4191. The Fourth Amendment's "touchstone" is not the statutory authority of a particular government actor, but rather the "reasonableness" of a search or seizure. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). Local officials may constitutionally honor ICE-detainer requests that convey, under the collective-knowledge doctrine, probable cause to detain.

The Fourth Amendment's reasonableness analysis proceeds in two steps. Courts first "begin with history." *Virginia v. Moore*, 553 U.S. 164, 168 (2008). "When history has not provided a conclusive answer," courts must "analyze[] a search or seizure in light of traditional standards of reasonableness 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at 171 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). Contrary to the district court, ROA.4191, this second-step balancing test does not turn on the identity of the official making the search or seizure or "the law of the particular State in which the search occurs." *Moore*, 553 U.S. at 172; *see, e.g.*, *United States v. Laville*, 480 F.3d 187, 196 (3d Cir. 2007); *United States v. Becerra-Garcia*, 397 F.3d 1167, 1174 (9th Cir. 2005); *United States v. Bell*, 54 F.3d 502, 504 (8th Cir.1995); *McKinney v. George*, 726 F.2d 1183, 1188 (7th Cir. 1984). Rather, the inquiry analyzes "the content of information possessed by police and its degree of

reliability." *Alabama v. White*, 496 U.S. 325, 330 (1990). Hence, a valid seizure by federal officers is just as reasonable when conducted by state officers under the same circumstances.

i. Here, the reasonableness analysis ends with the first step: "history" undoubtedly supports state authority to detain aliens based on requests from federal immigration agents. *Moore*, 553 U.S. at 168. As the district court recognized, local cooperation in honoring ICE-detainer requests has existed throughout the Nation in some form since at least the 1940s. ROA.4186 n.71. In 1987, the federal Executive Branch then enacted regulations codifying the ability of federal immigration authorities to request that local law-enforcement agencies maintain custody of an alien, for up to 48 hours after his release date, to allow federal immigration officials to take custody. 52 Fed. Reg. 16,370, 16,373 (May 5, 1987) (codified as amended at 8 C.F.R. §287.7(d)). This decades-long history validates state ICE-detainer compliance.

ii. Even if the Court were to proceed to the second step and balance the liberty intrusion versus governmental interests, ICE detainers do not violate the Fourth Amendment—as multiple circuits have held. Immigration enforcement necessarily contemplates detention for removal, so the liberty intrusion of detaining an alien is justified where there is probable cause of removability. *See supra* p. 14. That is especially true here, where ICE detainers apply only to individuals already detained in the criminal-justice system.

The liberty intrusion from detention is justified for immigration violations even without "probable cause of a crime," ROA.4199, which the district court wrongly required. *See* U.S. Stay Br. 11-12 & n.6 (collecting cases). "Lawful warrantless arrest

is not necessarily limited to those instances in which the arrest is made for criminal conduct." 3 Wayne LaFave et al., *Search and Seizure* §5.1(b) (5th ed. 2012).[13] Examples include arrest of intoxicated persons who are "likely to suffer or cause physical harm or damage property," *Commonwealth v. O'Connor*, 546 N.E.2d 336, 341 (Mass. 1989); seizing a juvenile on probable cause that he is a runaway, *In re Marrhonda G.*, 613 N.E.2d 568, 663 (N.Y. 1993); and warrantless arrest for medical evaluation based on probable cause that a person is mentally ill and dangerous to himself or others, *Maag v. Wessler*, 960 F.2d 773, 775 (9th Cir. 1991). This Court likewise held in *Cantrell v. City of Murphy*, 666 F.3d 911 (5th Cir. 2012), that officers may constitutionally seize a suicidal person on probable cause to believe the person is a danger to himself or others. *Id.* at 923. In short, probable cause of a *crime* is not required for a reasonable seizure under the Fourth Amendment; civil probable-cause predicates can suffice, as does probable cause of removability, *see supra* pp. 14-15.

The governmental interest in civil immigration detention also exists regardless of whether the first 48 hours of detention are carried out by state or local officers or by the federal government itself. When federal agents request detention through an ICE detainer, the federal government necessarily asserts its "sovereign prerogative" in maintaining the integrity of its borders. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

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[13] Insofar as *Mercado v. Dallas County*, 229 F. Supp. 3d 501 (N.D. Tex. 2017), and *Santoyo v. United States*, 2017 WL 2896021 (W.D. Tex. June 5, 2017), could be read to require *criminal* probable cause before a locality can honor ICE detainers, those decisions are wrongly based on the same errors regarding the requisite probable cause that underlie the decision below.

Furthermore, immigration-law enforcement is not only a federal-government interest. *See Arizona*, 567 U.S. at 397 ("The pervasiveness of federal regulation does not diminish the important of immigration policy to the States."). States, too, are sovereigns with an interest in border control. *See, e.g.*, *id.*; *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982) (noting state "sovereign interest" in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction"). Although States ceded to the federal government their authority to determine which aliens are lawfully present in their borders, *see Arizona*, 567 U.S. at 409, States did not cede their *interest* in ensuring that aliens within their borders are lawfully present. *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 163 (5th Cir. 2015) (holding that state "interests" in enforcing federal lawful-presence provisions "fall within the zone of interests of the INA"), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam).

Consequently, multiple circuits agree that ICE detainers do not violate the Fourth Amendment. For instance, the Sixth Circuit explained that "[f]ederal detainers do not raise constitutional problems in the normal course." *Ortega v. U.S. ICE*, 737 F.3d 435, 438 (6th Cir. 2013).

The Eighth Circuit similarly held "meritless" the argument that state and local officials cannot detain aliens at the express request of federal immigration agents. *United States v. Ovando-Garzo*, 752 F.3d 1161, 1164 (8th Cir. 2014). The court rejected the argument that state and local officials "generally have no authority to arrest aliens on the basis of possible removability which Congress has given to trained federal immigration officers." *Id.* The court held that the state trooper's acts there—

"identifying [the alien, communicating with federal officials, and detaining the alien] until the Border Patrol agent could take custody—were not unilateral and, thus, did not exceed the scope of his authority." *Id.*

Likewise, as the Fourth Circuit has explained, "a state police officer" does not violate the Fourth Amendment when detaining unlawfully-present aliens "at ICE's express direction." *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 466-67 (4th Cir. 2013). The holding in *Santos* thus turned on whether the local official was or "was not directed or authorized by ICE," *id.* at 466—that is, whether the seizure was made "absent ICE's express authorization of direction,"[14] *id.* at 468; *see id.* at 465 ("[A]bsent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law.").

iii. Under existing ICE policy, ICE-detainer requests expressly convey to state and local officials the existence of probable cause to believe that the subject is a removable alien. Federal officials thus make particularized determinations assessing probable cause of removability each time they issue an ICE detainer. Local officials have no countervailing authority to assess removability for themselves. *See Arizona*,

[14] *Santos* invalidated a particular arrest because "ICE's request that Santos be detained on ICE's behalf came fully forty-five minutes after Santos had already been arrested," so "the deputies' initial seizure of Santos was not directed or authorized by ICE." 725 F.3d at 466; *see also Quintana*, 623 F.3d at 1241 (similarly distinguishing scenarios where "probable cause to believe that the defendants were deportable aliens was acquired *after* their illegal arrest and detention"). By contrast, SB4 does not authorize detention based only on the abstract existence of a civil-immigration-arrest warrant. *See* Tex. Code Crim. Proc. art. 2.251(a).

567 U.S. at 409; *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 532 (5th Cir. 2013) (en banc).

The consolidated ICE-detainer form, which ICE agents must use for a detainer request, explicitly states: "DHS has determined that probable cause exists that the subject is a removable alien." Form I-247A at 1. The form then allows the ICE agent to further describe the basis for probable cause as at least one of four findings:

- "A final order of removal against the alien;"
- "The pendency of ongoing removal proceedings against the alien";
- "Biometric confirmation of the alien's identity and a records check of federal databases . . . ."; or
- "Statements made by the alien to an immigration officer and/or other reliable evidence that affirmatively indicate the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law."

Id.

Each ICE-detainer request also must be accompanied by one of two federal immigration warrants.[15] One warrant (Form I-200), issued by an "Authorized Immigration Officer," states that the official has "determined that there is probable cause to believe that" the alien "is removable from the United States" based on charging

[15] ICE added this warrant requirement in April 2017. *See* ICE Policy 10074.2 at 1. Although not required, the immigration warrants are meant to preclude the argument that ICE detainers exceed ICE's warrantless-arrest authority under the INA. *Id.* at 2 n.2 (citing *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1008 (N.D. Ill. 2016)).

documents of removability, pending removal proceedings, failure to establish admissibility, biometric confirmation, or statements by the alien that the individual either lacks immigration status or is removable. U.S. Department of Homeland Security, Warrant for Arrest of Alien, Form I-200 (Rev. 09/16), https://perma.cc/5CQP-R544. The other warrant (Form I-205), states that the alien is "subject to removal/deportation from the United States, based upon a final order" by one of several executive or judicial authorities and "pursuant to . . . the Immigration and Nationality Act" as indicated by the officer executing the warrant. U.S. Immigration and Customs Enforcement, Warrant of Removal / Deportation, ICE Form I-205 (8/07), https://perma.cc/62NR-ZK7Z.

The collective-knowledge doctrine therefore gives local officials probable cause to detain based on the federal representations in ICE detainers and immigration warrants. That doctrine applies even if local officials are "unaware of the specific facts that established probable cause."[16] *United States v. Hensley*, 469 U.S. 221, 231 (1985); *accord, e.g.*, *United States v. Ibarra-Sanchez*, 199 F.3d 753, 759-60 (5th Cir. 1999). In other words, "it is not necessary for the arresting officer to know all of the facts amounting to probable cause, as long as there is some degree of communication between the arresting officer and an officer who has knowledge of all the necessary facts." *United States v. Ortiz*, 781 F.3d 221, 228 (5th Cir. 2015); *see United States v.*

[16] The ICE-detainer form and immigration warrants thus exceed the collective-knowledge-doctrine's requirements by including check-boxes providing the factual basis supporting removability. *See supra* p. 21.

Ibarra, 493 F.3d 526, 530 (5th Cir. 2007). An ICE-detainer request includes that requisite communication.

The collective-knowledge doctrine applies to all Fourth Amendment seizures, including in the immigration context. *See, e.g.*, *Mendoza v. U.S. ICE*, 849 F.3d 408, 419 (8th Cir. 2017) ("County employees . . . reasonably relied on [ICE agent's] probable cause determination for the detainer."); *People v. Xirum*, 993 N.Y.S.2d 627, 631 (Sup. Ct. 2014) ("Similar to the fellow officer rule . . . the [state] had the right to rely upon [a detainer issued by] the very federal law enforcement agency charged under the law with 'the identification, apprehension, and removal of illegal aliens from the United States.'") (quoting *Arizona*, 567 U.S. at 397); *see also United States v. Hernandez*, 477 F.3d 210, 215 n.13 (5th Cir. 2007). The district court thus erred in concluding that local officials cannot act on ICE agents' immigration warrants if the local officials cannot make "a particularized assessment of probable cause of removability." ROA.4195.

To the extent that a detainee in any particular case argues that probable cause was lacking—such as to claim that a local officer had conclusive, affirmative knowledge that the federal agents' determination was wrong—that claim would be only an as-applied challenge to a specific detention, not a basis for facially enjoining SB4's ICE-detainer mandate. *See Salerno*, 481 U.S. at 745. Unlike in *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015), SB4 will not "prohibit the particularized assessment of probable cause in every case in which it applies," as ICE detainers themselves reflect ICE's particularized finding of probable cause of removability. *Cf.*

ROA.4197.[17] Isolated scenarios that could hypothetically contradict federal agents' probable-cause determinations cannot facially invalidate SB4. In any event, even viable as-applied challenges would be highly speculative, as SB4's ICE-detainer mandate allows a local official not to detain if the subject produces proof of lawful status. Tex. Code Crim. Proc. art. 2.251(b).

iv. Under the district court's and plaintiffs' reasoning that the Fourth Amendment requires "probable cause of a *crime*," ROA.4199, local officers could not even comply with ICE-detainer requests voluntarily. The district court's sweeping reasoning would thus end a legitimate form of federal–local cooperation that has existed for decades. *See supra* pp. 14, 17.

The district court's order also jeopardizes other forms of federal–local cooperation. For example, local law-enforcement agencies can contract with federal officials to become deputized de facto immigration officials and undertake specific immigration-enforcement functions, 8 U.S.C. §1357(g), such as issuing "immigration detainers," serving "warrants of arrest for immigration violations," and "process[ing] . . . immigration violations." Memorandum of Agreement Between U.S. Immigration and Customs Enforcement and Tarrant County Sheriff's Office 17-18 (June 19, 2017), https://perma.cc/7D4J-CGGZ. It is unclear how those arrangements survive

[17] The relevant facial-validity circumstances in *Patel* were those in which the basis for the search was the challenged ordinance, as opposed to those under which the ordinance did "no work." 135 S. Ct. at 2451. SB4 is doing work each time state or local officials get a federal ICE-detainer request, as SB4 requires honoring that detainer request (unless SB4's exception is met when the detainee shows proof of lawful status). *See* Tex. Code Crim. Proc. art. 2.251(a)-(b).

the district court's sweeping Fourth Amendment ruling that local officials can detain and execute warrants only on "probable cause of a crime." ROA.4199.

2. The district court erred in concluding that the ICE-detainer provisions would be preempted.

The district court conflated the Fourth Amendment analysis with a preemption inquiry. ROA.4195 & n.81. Regardless, federal law does not preempt state law requiring compliance with ICE detainers. To the contrary, 8 U.S.C. §1357(g)(10)(B) expressly allows state and local cooperation with federal officials' enforcement of immigration law even without a formal §1357(g) agreement.

This "federal statute permit[s] state officers to 'cooperate with [federal officials] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," *Arizona*, 567 U.S. at 410 (quoting 8 U.S.C. §1357(g)(10)(B)):

> *Nothing in this subsection shall be construed to require an agreement* under this subsection in order for any officer or employee of a State or political subdivision of a State—
>
> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise *to cooperate with the Attorney General* in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. §1357(g)(10) (emphases added). Thus, even if States gave up certain aspects of their common-law police powers upon joining the Union by submitting to federal preemption under the Supremacy Clause, *cf.* ROA.4189-90, the INA,

through 8 U.S.C. §1357(g)(10)(B), restored any otherwise-preempted state power to comply with ICE-detainer requests.

Nor is 8 U.S.C. §1357(g)(10)(B)'s savings clause limited to information sharing, as the district court intimated. ROA.4151. Subsection (A) of §1357(g)(10) separately saves information-sharing from preemption. *Arizona* thus recognized multiple examples of enforcement "cooperation" that, under §1357(g)(10)(B), cannot be held preempted merely because of the absence of formal §1357(g) agreements: "situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities." *Arizona*, 567 U.S. at 410.

Arizona, in contrast, held preempted a state law that allowed detention based on "the *unilateral* decision of state officers to arrest an alien for being removable *absent any request, approval, or other instruction from the Federal Government*." 567 U.S. at 410 (emphases added). *Arizona* came nowhere close to suggesting that a State cannot honor an ICE-detainer request. When a State honors an ICE-detainer request, the "predicate for an arrest" is the federal government's express "request" and "instruction." *Id.* at 407, 410. A State honoring an ICE-detainer request is *not* "[d]etaining individuals solely to verify their immigration status," *id.* at 413, and thus constitutional concerns from such a practice are absent here. Rather, the State must rely on the federal government's representation that there is *already* probable cause of removability. *See Quintana*, 623 F.3d at 1241-42 (holding a state trooper "authorized to assist" in detention under 8 U.S.C. §1357(g)(10)(B) based on a border-patrol

agent's probable cause of removability). So SB4 enacted no "policies that undermine federal law." *Arizona*, 567 U.S. at 416.

Thus, SB4's ICE-detainer mandate is neither conflict nor field preempted. *Cf.* ROA.4195 & n.81. It is not conflict preempted because compliance with both federal and state law is not a "physical impossibility," and state law presents no "obstacle" to federal law. *Arizona*, 567 U.S. at 399. SB4's article 2.251 gives Texas officials no greater authority to detain aliens than that possessed by federal immigration officers. *Cf. id.* at 408. Article 2.251 merely requires cooperating with the federal government's detainer requests. The federal government, not state officials, retains all control over deciding who is an unlawfully present alien that should be removed.

It is thus irrelevant that SB4 mandates what federal law makes voluntary. State laws that did just that in the immigration context were held not preempted in both *Arizona* and *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011). *Arizona* upheld a state law mandating immigration-status inquiries, where federal law made them voluntary. 567 U.S. at 411-13. And *Whiting* upheld a state law mandating that employers check immigration status with an electronic-verification system, where federal law made such use voluntary. 563 U.S. at 609-10. As with the E-Verify system in *Whiting*, federal statutory authority regarding issuance of ICE-detainer requests "contains no language circumscribing state action." *Id.* at 608; *see* 8 U.S.C. §1357(d)(3). Texas's requirement that law-enforcement agencies honor ICE-detainer requests "in no way obstructs achieving those aims" of federal law. *Whiting*, 563 U.S. at 609. To the contrary, it helps fulfill them.

Field preemption does not apply because no statute shows a clear congressional purpose to "pervasively" regulate and "displace[] state law altogether" or to "preclude" States from requiring their localities to cooperate with federal immigration officials. *Arizona*, 567 U.S. at 399. In fact, Congress could not possibly have preempted this field because Congress lacks the power, under the Tenth Amendment, to direct state or local officials to enforce federal law: "Under the Tenth Amendment, immigration officials may not . . . command the government agencies of the states to imprison persons of interest to federal officials." *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014). This is precisely why the INA did not even attempt to "authorize federal officials to *command* local or state officials to detain suspected [removable] aliens." *Id.* at 640 (emphasis added).

Of course, while the Tenth Amendment limits "the federal government," *Galarza*, 745 F.3d at 643, it does not limit a *State*'s ability to instruct its own local entities and officials, *see, e.g.*, *Stone v. City of Prescott*, 173 F.3d 1172, 1175 (9th Cir. 1999) ("[T]he power of the federal government . . . is constrained by the Tenth Amendment, not the power of the States."). Rather, local officials' authority is set at "the absolute discretion of the State." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 682 (1978) (municipalities are "state instrumentalities"); *see also* Tex. Const. art. XI, §1 (counties are "legal subdivisions of the State"), art. V, §23 (sheriffs' "duties . . . shall be prescribed by the Legislature"). The anti-commandeering limit on *federal* action is why ICE detainers take the form of federal requests—rather than commands—for state or local

action. But SB4's domain—how a State instructs its own subdivisions and officials to act—is categorically outside any field Congress can possibly preempt.

B. Section 752.053(b)(3)'s assistance-and-cooperation provision is not preempted.

For many of the reasons that SB4's ICE-detainer mandate is not preempted, *see supra* Part I.A.2, the district court erred in holding that SB4's assistance-and-cooperation provision (§752.053(b)(3)) is field and conflict preempted. ROA.4138-52. As the stay panel explained, "nothing in *Arizona v. United States*, 567 U.S. 387 (2012), prohibits such assistance" and "the statute on which the district court relied, 8 U.S.C. § 1357(g), provides for such assistance." Stay Op. *2.

1. The district court misconstrued SB4's assistance-and-cooperation provision, which requires a predicate federal request for assistance.

The district court flouted SB4's text and purpose by pretending that §752.053(b)(3) requires localities to engage in *unilateral* immigration enforcement, rather than assistance and cooperation with the federal government.

Nothing in SB4 requires (or allows) unilateral enforcement: Section 752.053(b)(3) prohibits local policies that prevent local officials from "assisting or cooperating with *a federal immigration officer* as reasonable or necessary, including providing enforcement assistance" (emphasis added). Before any such assistance or cooperation can occur, the federal government must first ask. This point follows ineluctably from the statutory phrase "assisting or cooperating with." The assistance-and-cooperation provision applies only when "cooperation is pursuant to a 'request,

approval, or other instruction from the Federal Government.'" U.S. Stay Br. 4 (quoting *Arizona*, 567 U.S. at 410).

Accordingly, "when the Attorney General has not requested [cooperation] and will not supervise local enforcement," ROA.4149, this SB4 provision does not come into play. SB4 does not, then, direct local officers to "apprehend and remove aliens without supervision and direction from the Federal Government." ROA.4150. Nor does it "establish[] a systematic local enforcement procedure." ROA.4152. And the State never claimed to have the "'inherent authority' to carry out immigration enforcement" unilaterally. ROA.4148.

2. The Supreme Court in *Arizona* recognized that promoting local–federal cooperation is not conflict or field preempted.

By misconstruing §752.053(b)(3), the district court erroneously found it not protected from preemption by 8 U.S.C. §1357(g)(10)(B). ROA.4150-51. But as the Supreme Court held in *Arizona*, this "federal statute permit[s] state officers to 'cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.'" 567 U.S. at 410 (quoting 8 U.S.C. §1357(g)(10)(B)). And that is precisely what SB4's §752.052(b)(3) does: it ensures that state and local officers are permitted to cooperate with the federal government in enforcing immigration law. SB4 is thus neither field nor conflict preempted, as 8 U.S.C. §1357(g)(10)(B) expressly says that such cooperation is permitted. When Congress expressly allows state or local action, there can be no conflict; simultaneously, express allowance shows that Congress intended the opposite

of occupying the field. *See supra* Part I.A.2 (discussing conflict and field preemption principles in the context of SB4's ICE-detainer provision).[18]

By cooperating with federal officials, the State is not unilaterally "determin[ing] whether a person is removable." *Arizona*, 567 U.S. at 409. Federal immigration officials are the ones who ultimately determine what steps to take (or not to take) to detain or remove any unlawfully present alien. There is no risk, then, of putting "local officials in the impermissible position of arresting and detaining persons based on their immigration status without federal direction and supervision." *Villas*, 726 F.3d at 532.

The district court incorrectly said that *Arizona* distinguished "communication from enforcement cooperation" as permissible activities. ROA.4151. *Arizona* held that "unilateral" state immigration enforcement was preempted. 567 U.S. at 410. But *Arizona* listed multiple examples of enforcement "cooperation" that is *permitted* under 8 U.S.C. §1357(g)(10)(B). *Id.* As the Supreme Court noted, the Obama Administration acknowledged that §1357(g)(10)(B) permitted States and localities—even without a formal §1357(g) agreement—to "participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities." *Id.* at 410. Moreover, as explained above, *see supra* pp. 25-27, it cannot be the case that information-sharing communication is the only acceptable form of cooperation absent a

[18] Far from acting to preempt state involvement in the effort to cooperate with federal immigration officials, Congress has broadly encouraged it. *See, e.g.*, 8 U.S.C. §§1103(a)(11), 1357(g)(10), 1373(a), (b), 1644.

formal written agreement—because §1357(g)(10)(A) saves such information-sharing from preemption in a section distinct from the savings clause in §1357(g)(10)(B) addressing enforcement cooperation. *Contra, e.g.*, ROA.4151. The district court's ruling conflates the two, effectively rendering §1357(g)(10)(B) a nullity.

3. Congress directs that the option of entering into a formal §1357(g) agreement does not foreclose other forms of cooperation.

The district court correctly recognized that "[s]ubsection (g)(10)(B) allows states to cooperate with the Attorney General absent a formal agreement." ROA.4148. But, in direct conflict with that observation, the court erroneously held SB4's §752.053(b)(3) preempted because it purportedly "circumvent[s]" the statutory requirements for formal agreements under 8 U.S.C. §1357(g)(1)-(5). ROA.4146.

As explained above, 8 U.S.C. §1357(g)(10)(B) says that a formal agreement is not required for federal–local enforcement cooperation. *See supra* pp. 25-26. By holding that formal §1357(g) agreements are the exclusive means for local officials to *cooperate* with federal officials in immigration enforcement, however, the district court effectively read §1357(g)(10)(B) out of the INA. ROA.4147-49, 4147 n.30.

If States or localities wanted their officials to be deputized as federal immigration officers and directly "perform the functions of an immigration officer," *Arizona*, 567 U.S. at 408—rather than merely "cooperate" with federal immigration officers in enforcing immigration law, §1357(g)(10)(B)—they would need to enter into formal agreements under §1357(g)(1)-(5). The state or local officials would then be de facto deputized federal immigration officers "subject to the direction and supervision of

the Attorney General." 8 U.S.C. §1357(g)(3). The local officials could enforce immigration laws without necessarily "cooperat[ing]" with other federal immigration officials. *Id.* §1357(g)(10)(B).

SB4's §752.053(b)(3), though, does not address whether the State or localities should enter into formal agreements for their officials to be deputized as de facto federal immigration officers. Instead, it deals with local officials "assisting or cooperating" with federal immigration officers' actions, which is exactly when a formal agreement is not needed under §1357(g)(10)(B). SB4 thus does not conflict with the "exacting requirements" for the altogether different formal agreements under §1357(g)(1)-(5). ROA.4144; *see, e.g.*, *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999) (observing that §1357(g)(10)(B) "evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws" even outside a "formal [§1357(g)] agreement").

Indeed, plaintiffs' own practices highlight the absurdity of the district court's conclusion that formal §1357(g) agreements are necessary for local officers to assist or cooperate with federal immigration officials in immigration enforcement. To take one example, like nearly all jurisdictions, plaintiff Travis County has long cooperated with federal officials in the enforcement of federal immigration law by enforcing ICE-detainer requests without formal agreements—at least when, in its "discretion and judgment," it determined that it was "appropriate to hold an individual." ROA.5937 ¶26 (Declaration of Travis County Sheriff).

The real question, therefore, is whether the decision of how much to cooperate with federal officials in the enforcement of federal immigration law must be decided

one-by-one by localities and their officials, or if a floor can be set by the State. As the United States noted below, "[n]othing in [8 U.S.C. §1357(g)(10)] suggests it permits *ad hoc* efforts at cooperation by individual officers but not state enactments to provide that same type of cooperation by all state officers." ROA.2565. Despite this, the district court concluded that federal law effectively *mandates* allowing any local government—or even a single local official—the unfettered discretion either to cooperate with, or to frustrate, the uniform administration of federal law. ROA.4144-52. That result, not SB4, would disserve uniformity in the federal government's ability to enforce immigration law.

* * *

At bottom, plaintiffs' claim is a dispute over the division of power between the State and its municipalities, not a dispute over federal preemption. Unlike the federal government, States do not face constitutional constraints on their ability to direct localities or local law-enforcement officials, whose power is set at "the absolute discretion of the [S]tate." *Hunter*, 207 U.S. at 178; *see supra* pp. 28-29. As this Court observed, "Whatever the outer limits of state sovereignty may be, it surely encompasses the right to set the duties of office for state-created officials and to regulate the internal affairs of governmental bodies." *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996). The State has every right to prohibit its own local subdivisions from impeding the immigration-enforcement cooperation that the federal government actively encourages. *See, e.g.*, *Arizona*, 567 U.S. at 412; 8 U.S.C. §1357(g)(10)(B).

4. The district court erred as to the remedy by ignoring SB4's severability clause.

Even if the district court were correct in its preemption conclusion—and it is not—its remedy sweeps too broadly. The court enjoined §753.053(b)(3) in its entirety based only on one term in that provision: "enforcement assistance." ROA.4138, 4151-52. It did so despite, and without reference to, SB4's severability clause expressing "the intent of the legislature that every . . . clause, phrase or word in this Act . . . are severable from each other." ROA.4228 (SB4 §7.01). Courts must apply state-law severability provisions to the greatest extent possible. *See, e.g.*, *Leavitt v. Jane L.*, 518 U.S. 137, 139-40 (1996) (per curiam).

Striking "enforcement assistance," in accordance with the severability clause, would not present any issues counseling against severing. Removing it would not "leave gaping loopholes." *Randall v. Sorrell*, 548 U.S. 230, 262 (2006). And it is not integral to the "functional coherence" of the statutory provision. *Villas*, 726 F.3d at 537. Thus, any preemption problem with "enforcement assistance" warrants, at most, enjoining that phrase alone.

C. Section 752.053(a)(1) and (a)(2)'s "materially limit" term is not facially void for vagueness.

The district court enjoined the requirements in §752.053(a)(1) and (a)(2) that law-enforcement agencies not "materially limit" the enforcement of immigration laws, ROA.4212-13, finding plaintiffs likely to succeed on their pre-enforcement facial challenge to that term as unconstitutionally vague. ROA.4173-80. That conclusion cannot stand. A law can only be invalidated as facially vague when "the provision 'simply has no core.'" *United States v. Gonzalez-Longoria*, 831 F.3d 670, 675

(5th Cir. 2016) (en banc) (quoting *Smith v. Goguen*, 415 U.S. 566, 578 (1974)).[19] A pre-enforcement, facial vagueness challenge is particularly "difficult, perhaps impossible, because facts are generally scarce." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 547 (5th Cir. 2008). Here, the phrase "materially limit" has a clear core, which is why plaintiffs can so assuredly know that their preferred policies are prohibited. *Cf.* ROA.4171.

1. Plaintiffs' concession that SB4 prohibits various policies they have in place shows that the law has a valid core, thus defeating their facial vagueness claim.

Plaintiffs conceded that SB4 prohibits their existing policies, and it is irrelevant for this facial-vagueness claim that plaintiffs raise some as-applied challenges implicating plaintiff officials' conduct.

One such concession came from El Cenizo's Mayor, who admitted that "SB4 would prohibit the enforcement" of that City's "sanctuary city" policy, which "limits the situations in which [city] . . . officials can engage in immigration enforcement or collect and disseminate such information." ROA.463 ¶19 (Reyes Decl.). Selectively limiting immigration enforcement, information gathering, and cooperation to particular situations is precisely the type of "material limit" on immigration enforcement that SB4 addresses. And plaintiffs' concession that some of their conduct is covered by SB4 defeats a facial vagueness challenge. *See, e.g.*, *Nat'l Org. for Marriage,*

[19] Because plaintiffs' facial vagueness challenge (besides their free-speech challenge to the endorsement provision) "implicates no constitutionally protected conduct," plaintiffs must show SB4 "is impermissibly vague in all of its applications." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

Inc. v. McKee, 669 F.3d 34, 42 (1st Cir. 2012) ("Given the statute's acknowledged clear application to 'some' of appellants' activities, defendants are correct insofar as they insist that appellants may not bring a facial vagueness challenge to [the statute]."") (citing *Holder v. Humanitarian Law Proj.*, 561 U.S. 1, 18-20 (2010)).

Confirming a clear core for the "material limit" prohibition, subsections (b)(1)-(4) of §752.053 give specific examples of what is prohibited by subsections (a)(1) and (2). *See* Tex. Gov't Code §752.053(b) ("In compliance with Subsection (a), ..."). Policies materially limiting lawful immigration-status questioning are within the prohibition. *Id.* §752.053(b)(1). Thus, the Maverick County Sheriff's policy of "instruct[ing] [his] deputies not to inquire as to an individual's immigration status during a law enforcement contact" is covered. ROA.446 ¶19 (Schmerber Decl.). And policies materially limiting information-sharing with the federal government are covered, under subsection (b)(2). The district court refused to enjoin either subsection (b)(1) or (b)(2). *See* ROA.4130-37.

Policies materially limiting "reasonable or necessary" assistance or cooperation "with a federal immigration officer" are also covered, under subsection (b)(3). *Arizona* noted that local law-enforcement officers could "participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities." 567 U.S. at 410. Thus, the policy that the "Maverick County Sheriff's Office will not participate or cooperate in the arrests of individuals for civil immigration violations," ROA.443 ¶9 (Schmerber Decl.), is covered. And policies materially limiting federal

access to jails would also be covered, under subsection (b)(4). These specific examples defeat any facial-vagueness argument that the "materially limit" language lacks a clear core of applicability.

2. Many of the hypotheticals raised by plaintiffs ignore SB4's textual parameters and cannot sustain a facial challenge.

Throughout this litigation, plaintiffs have raised various, factbound hypotheticals about SB4's coverage. But such hypotheticals on the margins of SB4's coverage cannot sustain a facial challenge. Regardless, plaintiffs have frequently ignored two key textual parameters on SB4. And, where narrowing context or settled legal concepts indicate a particular meaning, "*every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." *Skilling*, 561 U.S. at 406; *accord, e.g.*, *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 396-97 (5th Cir. 2013).

First, §752.053(a)(1) and (2) concern material limits on "the enforcement of immigration laws." A "material" limit therefore must address immigration law, as opposed to general matters like overtime and patrolling locations. *Cf.* ROA.4175. That is because the term "material" requires a "logical connection" between action and "consequential facts," which here is immigration-law enforcement. Black's Law Dictionary 1124 (10th ed. 2014).[20]

[20] A materiality standard is routine in the law. *E.g.*, Fed. R. Evid. 807(a)(2). For example, "materially limit[]" is used in federal law. *E.g.*, 15 U.S.C. §77d-1(b)(1)(H)(i); *Comm'r v. Estate of Hubert*, 520 U.S. 93, 105-07 (1997) (plurality op.) (discussing a "material limitation" standard). Likewise, the ABA model rules on professional conduct refer to a "materially limit[]" standard. Model Rules of Prof'l Conduct 1.7(a)(2), 1.10(a)(1) (Am. Bar Ass'n 2016).

Hence, SB4 does not prohibit immigration-neutral local policies regarding bona fide resource allocation. The Travis County Sheriff is incorrect that her practices of "declin[ing] requests from federal immigration authorities to assist them in the apprehension of individuals" because of "limited resources" will be prohibited under SB4. ROA.1831 ¶46 (Hernandez Decl.); *see also* ROA.1290 ¶23 (Austin Police Chief Manley Decl.).[21]

Second, SB4 applies only to policies implicating powers that a locality already has the lawful ability to perform. A "material" limit is one that is "substantial," as opposed to insignificant. Webster's New International Dictionary 1392 (3d ed. 2002). And a local policy cannot "materially limit" immigration-law enforcement if it prohibits actions that the locality already lacks the power to lawfully perform. In general, this means that SB4 applies only to policies involving situations where the federal government has first requested assistance or cooperation. Otherwise, local officials would be engaged in "unilateral" immigration-enforcement action, which is generally preempted under *Arizona*, 567 U.S. at 410.[22] So policies banning unilat-

[21] However, if there were no bona fide resource constraints—and that was just a pretextual excuse masking a "pattern or practice," Tex. Gov't Code §752.053(a)(2), of singling out immigration enforcement for limitation—then SB4 would apply.

[22] State and local officials are permitted to unilaterally ask about immigration status, at least when (1) they have made an arrest, stop, or detention "on some other legitimate basis" and (2) there is "reasonable suspicion" of removability. *Arizona*, 567 U.S. at 411; *see* Tex. Gov't Code §752.053(b)(1) (inquiry permissible if person is "under a lawful detention or under arrest").

eral immigration enforcement would not "materially limit" any "immigration enforcement" powers of the locality. Tex. Gov't Code §752.053(a)(1)-(2). That conclusion is further bolstered by §752.053(b)(3), which only covers assistance or cooperation "with a federal immigration officer" as "reasonable or necessary."

Consequently, SB4 does not prohibit a police chief from instructing officers not detain motorists to ask about immigration status without reasonable suspicion, as the Constitution already denies that authority. *See* ROA.4203 ("questioning not supported by any quantum of suspicion" satisfies the Fourth Amendment only if "it does not prolong an otherwise lawful detention") (citing *Muehler*, 544 U.S. at 101). Nor would a locality's patrolling priorities be implicated, ROA.4175, because cities have no "unilateral" immigration-enforcement authority in that field to "materially limit."[23]

In all events, concerns about SB4's application to hypothetical situations cannot sustain a facial challenge. ROA.4176; *see, e.g.*, *Hoffman Estates*, 455 U.S. at 503-04. Since "gradations of fact or charge would make a difference" as to liability, "adjudication of the reach and constitutionality of [the statute] must await a concrete fact situation." *Humanitarian Law Proj.*, 561 U.S. at 25. Moreover, the State has not yet enforced SB4 against anyone. *Cf. Johnson v. United States*, 135 S. Ct. 2551, 2561

[23] "Materially limit" is not vague based on *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832 (5th Cir. 1979) (striking down law prohibiting actions that "hamper or impede" airport business). The language invalidated in that case is distinguishable from SB4. For instance, it lacks the *material* qualifier. That plaintiffs challenge such common statutory terms merely illustrates why limiting constructions should be favored to avoid unnecessary constitutional conflict.

(2015). The proper challenge to any application of SB4 on the margins is in post-enforcement proceedings. *See Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (holding that as-applied claims are "the basic building blocks of constitutional adjudication.").

3. The Supreme Court in *Johnson v. United States* did not jettison established facial-vagueness doctrine.

The district court's facial-vagueness holding rested largely on *Johnson v. United States*. ROA.4173. Unlike in *Johnson*, several plaintiffs here *concede* that their conduct would be covered by SB4. *See supra* Part I.C.1. This alone confirms that SB4 has a valid "core" and thus cannot be facially vague. *Gonzalez-Longoria*, 831 F.3d at 675.

Furthermore, a "narrower reading [of *Johnson*] is more sound," and that narrow reading construes *Johnson* as dealing with "a long-considered ill-ease and eventual repudiation of the categorical approach in the specific context of the Armed Career Criminal Act's residual clause." *Id.* at 675-76. *Johnson* involved "'[n]ine years' experience trying to derive meaning from the [residual] clause,' 'repeated attempts and repeated failures to craft a principled and objective standard,' and years of 'pervasive disagreement' in the lower courts.'" *Id.* at 678 (quoting *Johnson*, 135 S. Ct. at 2558-60).

But like in *Gonzalez-Longoria*, such "a record of unworkability [is] not present here." *Id.* This case is in a pre-enforcement posture; there has been virtually no experience applying the statute and certainly no splits over the statute's language. Nor does SB4's statutory language invoke a secondary doctrine, like the categorical approach for sentencing, that "require[s] applying an uncertain term to 'an idealized

ordinary case of the crime,' and 'not to real-world facts or statutory elements.'" *Crooks v. Mabus*, 845 F.3d 412, 417 (D.C. Cir. 2016) (quoting *Johnson*, 135 S. Ct. at 2557, 2561). As in *Gonzalez-Longoria*, application of SB4 requires no "clairvoyance as to a potential risk of injury." 831 F.3d at 677.

Nor is SB4 facially vague merely because "it may be difficult in some cases to determine whether [its] clear requirements have been met," or because it gives rise to close legal questions. *United States v. Williams*, 553 U.S. 285, 306 (2008); *see Salman v. United States*, 137 S. Ct. 420, 428-29 (2016) (purported uncertainty in interpretation "alone cannot render 'shapeless' a federal criminal prohibition, for even clear rules 'produce close cases'") (quoting *Johnson*, 135 S. Ct. at 2560). That is particularly true here because "courts should seek an interpretation that supports the constitutionality of legislation and avoid invalidating a statute as vague." *Gonzalez-Longoria*, 831 F.3d at 678-79. As explained above, the State has offered valid constructions of SB4's "materially limit" language that cabins the situations in which its provisions apply and distinguish SB4 from a statute that has no "core." *Id.* at 675.

D. Section 752.053(a)(1)'s term "endorse" does not violate the Free Speech Clause.

The district court erred in holding that §752.053(a)(1) unconstitutionally impairs free speech in providing that local officials may not "adopt, enforce, or endorse" policies blocking immigration-law enforcement. ROA.4154-67. A constitutionally problematic definition of "endorse" is not compelled by the statute's text. Like the other serial verbs in §752.053(a)(1), "endorse" is undefined in the statute. With the aid of a few online dictionaries, ROA.4160 nn.45 & 46, the district court

interpreted "endorse" to be "sweeping in scope," ROA.4163, based on what it "could mean," ROA.4160. As a result, the court agreed with plaintiffs that "endorse" could sweep in elected officials' political speech in a viewpoint-discriminatory manner. ROA.4158-63, 4166-67.

But in a facial challenge—and particularly in the overbreadth context, *see, e.g.*, *United States v. Wallington*, 889 F.2d 573, 576 (5th Cir. 1989)—statutory provisions must be interpreted to avoid constitutional concerns, *see, e.g.*, *Virginia v. Am. Booksellers Ass'n Inc.*, 484 U.S. 383, 397 (1988). The Supreme Court has repeatedly admonished that "[t]he elementary rule is that *every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." *Skilling*, 561 U.S. at 406; *see Steen*, 732 F.3d at 396-97.

As the State proposed, ROA.2642-43, 3879-81—but the district court did not meaningfully address, *see* ROA.4152-67—the term "endorse" in SB4 can be narrowly construed to resolve any doubt as to its constitutional validity: the dictionary definition "to sanction." Webster's New International Dictionary 845 (2d ed. 1945); *accord* Webster's New World College Dictionary 480 (5th ed. 2016); Oxford English Dictionary 162 (Oxford Univ. Press 1971). To "sanction," in turn, means "to ratify or confirm," or "to authorize or permit; countenance." Webster's New World College Dictionary 1286. And, of course, use of official power is required to authorize or

ratify something. So defined, SB4's endorsement prohibition easily admits a legitimate application that does not infringe on officials' political speech.[24]

This constitutionally unproblematic definition of "endorse" would give that word "fair meaning" in accord with the law's design. *United States v. Moore*, 423 U.S. 122, 145 (1975). SB4 is designed to stop local law-enforcement agencies from having policies that obstruct cooperation with federal immigration officials. *See supra* pp. 2-7. The endorsement prohibition furthers that goal by directing that a law-enforcement agency may not ratify, confirm, authorize, or permit an agency practice contrary to §752.053(b)(1)-(4). ROA.4217-18. This has nothing to do with the political process, political campaigns, or constitutionally protected speech generally. The noncooperation policies that SB4 aims to prevent would be undertaken in those individuals' official capacities as government employees and thus would not trigger free-speech concerns.[25] The "existence" of this "wide swath of constitutional applications of the provision . . . suffice[s] to prevent a facial remedy" invalidating the

[24] Adopting this reasonable, narrow construction would also resolve any related concerns about alleged vagueness and viewpoint-discrimination, *see* ROA.4163-67, which the district court considered under the umbrella of free speech, ROA.4152. As discussed above, the issue for constitutional vagueness is whether the challenged provision provides no standard at all to determine what conduct is covered. *See supra* pp. 35-36. The word "endorse" and its dictionary definition "to sanction" are not terms of art. Moreover, the statute itself provides four concrete examples of policies that local officials are prohibited from endorsing. Tex. Gov't Code §752.053(b)(1)-(4); *contra* ROA.4165.

[25] As the Supreme Court has recognized, "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

provision on First Amendment grounds. *Steen*, 732 F.3d at 397 (reversing the district court for "fail[ing] to assess whether 'a substantial number' of the [statute's applications] are unconstitutional, judged in relation to the provision's 'plainly legitimate sweep,' . . . [as] required in a facial challenge on First Amendment grounds").

The State's proposed construction of "endorse" best accords with longstanding canons of statutory construction. When a statutory term is unclear, courts commonly look to surrounding statutory provisions "[o]n the same subject" for guidance. Black's Law Dictionary 911 (10th ed. 2014) (discussing the *in pari materia* statutory construction canon). Accordingly, the term "endorse" should be construed *in pari materia* with the other prohibited local-entity actions in the same clause, namely "adopt" and "enforce." *See Pervis ex rel. Pervis v. LaMarque Ind. Sch. Dist.*, 466 F.2d 1054, 1057 (5th Cir. 1972); *see also United States v. Golding*, 332 F.3d 838, 844 (5th Cir. 2003) (discussing "the canon of *noscitur a sociis*, which directs [courts] to interpret a term in a statute 'by reference to the words associated with them in the statute.'"). As the district court tacitly recognized, neither "adopt" nor "enforce" implicates political speech or speech more generally. It would be odd for the Legislature to have intended a definition of "endorse" so broad as to implicate elected officials' political speech, when the prohibited actions right around it—like the rest of SB4—say nothing at all about political speech or campaigns.

The State has offered a "reasonable" (*Skilling*, 561 U.S. at 410) construction of "endorse" that would not raise free-speech concerns. That should have ended the

free-speech facial-challenge analysis. *See, e.g.*, *Steen*, 732 F.3d at 387, 397-98 (discussing the "daunting" task for First Amendment facial challenges).[26]

II. Plaintiffs Did Not Carry Their Burden on the Equitable Factors.

To obtain a preliminary injunction, a plaintiff must show not only a substantial likelihood of success on the merits but "that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs did not make those showings.

A. Plaintiffs will suffer no irreparable injury.

Plaintiffs must show that irreparable injury is likely absent an injunction: "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22.

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[26] As the stay panel found—and the parties now appear to agree—the district court's injunction regarding this provision enjoined only the word "endorse." *See* Stay Op. *2; San Antonio Stay Resp. 22-23. Earlier language in the district court's order, however, appeared to reject the State's "suggest[ion] that perhaps the Court could just strike the word 'endorse.'" ROA.4158. If there were constitutional problems with "endorse" that could not be resolved through a reasonable narrowing construction, the proper remedy would be to strike "endorse" alone and leave untouched the remainder of the statutory provision containing that word. *See, e.g.*, *Phelps-Roper v. Koster*, 713 F.3d 942, 953 (8th Cir. 2013) (striking one unconstitutional word, and upholding the rest, because the offending word "appears just once in each statute, and only as part of a serial list").

The district court's finding of irreparable injury to plaintiffs rests largely on equating the legal violations that plaintiffs assert with irreparable injury to plaintiffs. ROA.4206-07 ("a violation of constitutional rights constitutes irreparable harm as a matter of law and no further showing of irreparable injury is necessary"). Even on that reasoning, however, there is no irreparable harm to plaintiffs because their challenges are meritless. *See supra* Part I. And plaintiffs' preemption challenge does not even involve constitutional rights. *Compare* ROA.4206 (so assuming), *with Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015) ("the Supremacy Clause is not the source of any federal rights") (quotation marks omitted).

Yet, even assuming a possible legal violation, the State does not "concede" irreparable harm to the cities, counties, and local officials suing here. ROA.4206. At the outset, their Fourth Amendment claim rests on the rights of potential detainees against unreasonable seizures, and a litigant cannot vicariously raise third parties' rights. *See United States v. Escamilla*, 852 F.3d 474, 485 (5th Cir. 2017) ("'Fourth Amendment rights are personal' and 'may not be vicariously asserted'") (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). Nor can law-enforcement officials claim injury from being held financially liable if their compliance with ICE detainers is ultimately held to violate the Fourth Amendment. Not only do officers have qualified immunity from civil liability,[27] but SB4 requires the State to defend and

[27] For this reason, law-enforcement officers lack any generally cognizable interest in declining enforcement of allegedly unconstitutional laws—at least laws not so "flagrantly unconstitutional" that the officer would not receive qualified immunity. *See Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979) ("Police are charged to enforce laws until and unless they are declared unconstitutional. . . . Society would be ill-

indemnify local entities in suits arising from good-faith compliance with ICE-detainer requests. Tex. Gov't Code §402.0241.

Plaintiffs also assert irreparable harm because, if they do not comply with the disputed SB4 provisions, they could face "harsh civil penalties and removal from office." ROA.4207; *accord* ROA.4209. But, if the State initiates an enforcement proceeding against a plaintiff for violation of SB4, that entity or official could raise its challenges to SB4 as a defense in such a proceeding. The penalties would not be imposed unless they are lawful. Such an enforcement proceeding also would be a better vehicle to address plaintiffs' vagueness challenges, as pre-enforcement challenges like this one are particularly disfavored. *See supra* pp. 35-36, 41-42. And the finding of an alleged chill on freedom of speech from the "endorse" provision, ROA.4208, falls with the merit of plaintiffs' First Amendment challenge. *See supra* Part I.D.

The district court also found that plaintiffs' inability under SB4 to prohibit or materially limit cooperation with federal immigration officials would impair plaintiffs' interest in allocating resources as they believe suits "the most pressing public safety needs of the community." ROA.4208. But that is not cognizable harm, as cities, counties, and local officials have power to allocate resources only as creatures of the State, consistent with the State's directives. *See City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976) ("Such entities are creatures of the state,

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served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement."); *cf.* ROA.4182 (reasoning that an officer's oath of office alone creates a cognizable interest in whether third-party rights renders laws not constitutionally entitled to enforcement).

and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state.").[28] Plaintiffs have no cognizable interest in allocating official resources contrary to the State's directives in SB4. The district court's listing of alleged negative public-safety consequences of local cooperation in immigration-law enforcement, ROA.4208-09—besides being impermissible and speculative disagreement with the public-safety judgments of the Legislature, *see infra* Part II.B—impinges no cognizable interest of the political subdivisions and local officials suing here. The stay panel was therefore correct that "no significant injury to the plaintiffs" results from local officials assisting and cooperating with federal officials' immigration-law enforcement. Stay Op. *2.

B. The preliminary injunction irreparably injures the State and adversely affects the public interest.

As the stay panel acknowledged, Stay Op. *2, circuit precedent holds that, "[w]hen a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013); *accord, e.g.*, *Maryland v. King*, 133 S. Ct. 1, 3 (2013) (Roberts, C.J., in chambers) ("Any

[28] Although *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979), contains language that could be read to conclude otherwise, this Court has subsequently emphasized: "The Supreme Court has held that state officials lack standing to challenge the constitutional validity of a state statute when they are not adversely affected by the statute, and their interest in the litigation is official, rather than personal." *Donelon v. Wise*, 522 F.3d 564, 566 (5th Cir. 2008).

time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (quotation and alteration marks omitted). The irreparable injury to the State from the preliminary injunction of its statute is therefore "the institutional analogue to a restraint on a human being's freedom of locomotion." *Ill. Dep't of Transp. v. Hinson*, 122 F.3d 370, 372 (7th Cir. 1997).

The district court minimized this irreparable injury, finding it trumped by the need for "protection of constitutional rights." ROA.4210. But enforcement of the disputed SB4 provisions does not violate any constitutional rights, *see supra* Part I, or cause any "concrete burdens" to plaintiffs, *see supra* Part II.A. Conversely, the irreparable injury *from* the preliminary injunction is very much a "concrete burden." The disputed SB4 provisions will determine, among other things, whether aliens in the criminal-justice system are held for federal immigration custody or released onto the streets where they can do concrete harm.

Under circuit precedent, the public-interest factor also favors the State when challenging a court's injunction: "As the State is the appealing party, its interest and harm merge with that of the public." *Planned Parenthood*, 734 F.3d at 419 (citing *Nken v. Holder*, 566 U.S. 418, 435 (2009), which holds that "these factors merge" when the government suffers irreparable harm). The district court flouted this precedent by crediting testimony from SB4's political opponents that the law "will" make communities less safe and "harm the State of Texas." ROA.4211. As the stay panel correctly held, the public interest favors the State in challenging an injunction of its law. Stay Op. *2.

Conclusion

The Court should reverse and vacate the preliminary injunction.

Respectfully submitted.

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Counsel certifies that, on September 28, 2017, this document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM/ECF document filing system.

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